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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,	
Plaintiff and Respondent,	G041060
v.	(Super. Ct. No. 07CF3937)
SANDY PATTERSON	O P I N I O N
Defendant and Appellant.	

Appeal from a judgment of the Superior Court of Orange County, John Conley, Judge. Affirmed.

Dabney Finch, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

* * *

Defendant Sandy Patterson was found guilty of possession of cocaine base, guilty of sale or transportation of cocaine base and not guilty of possession of cocaine base for sale. The jury was not asked to make a separate finding whether or not defendant possessed cocaine for personal use. We appointed counsel to represent defendant on appeal. Counsel filed a brief which set forth the facts of the case. Counsel did not argue against the client, but advised the court no issues were found to argue on defendant's behalf. Counsel noted three issues to assist our appellate review: 1) "Was it erroneous for the trial court to deny the defense's motion to prohibit Ms. Canzano from testifying about her fears of retaliation from defendant?" 2) "Was it erroneous for the trial court to deny the defense's motion for new trial based on juror misconduct?" and 3) "Was it erroneous for the trial court to deny Proposition 36 probation to Mr. Patterson absent a jury true finding on a special allegation the drugs were not for his personal use?"

I

FACTS

Karen Canzano testified under a grant of immunity. Canzano used crack cocaine on and off for five years before the instant incident. Previous to using drugs, she worked for the California Highway Patrol for almost 16 years.

On November 29, 2007, defendant telephoned Canzano. She purchased crack cocaine from defendant in a Santa Ana motel room. Defendant did not use crack cocaine, but used "another form of cocaine." Early on November 30, Canzano and defendant left the motel room for a second time. Canzano drove. As Canzano made a U-turn just outside the motel, a police officer pulled them over. As the officer approached, defendant "started grabbing for something in his pockets and stuffing something under the seat."

At the sentencing hearing, the court found defendant did not possess drugs for personal used based on the amount of drugs found, defendant was not under the influence when he was arrested, the fact that no paraphernalia was found and based on

defendant's prior record. The court found all 20 of defendant's priors to be true, but struck them all for purposes of sentencing, and sentenced defendant to the low term of three years in prison.

II

DISCUSSION

Canzano's Testimony

Outside the presence of the jury, Canzano said: "Okay, I will tell you right now I have zero motivation for him to go to jail because I'll be looking over my back for however long. So I don't care what happens here. Do what you have to do. Put me in contempt, I don't care. But you know what, get it over with. It's a fricking simple trial. How many times does she have to ask the same questions? You know, if he is not guilty I'll be happy, because then I don't have to worry about looking over my shoulder for the rest of my life. Okay? Wake up. There's a retaliation factor, okay? I'm just here to do the right thing but I'm tired of the grilling. So she needs to get it over with or you throw me in jail. Whatever has to happen. But I am over it, okay? This is ridiculous."

A few minutes later, Canzano told the court: "You aren't the one that has to go on after this and wonder whether, you know, some guy is going to show up in your bedroom and kill you. . . . But I'm telling you I'm an absolute hostile witness." Then she explained she was worried about retaliation, and said: "I don't want to wake up to have somebody holding a knife over me. Slit my throat."

Defense counsel moved to exclude anything to do with fear of retaliation. The court denied the motion on the basis of relevancy, explaining: "It's up to both sides whether they choose to solicit that fear. [I]t seems to be a genuine fear."

In the presence of the jury, defense counsel elicited from Canzano that she saw no weapons on defendant and that he made no threats to her. She volunteered: "He's actually a very nice guy." When counsel pressed to get her to admit defendant "hasn't made any threats to you since the date that this happened," Canzano retorted:

"No, but he is not going to prison right now until we're done here." The court struck that answer as being nonresponsive. Canzano then conceded defendant sent her no letters and did not telephone her or have anyone telephone on his behalf. Counsel pursued by asking whether Canzano was "very angry about being here." Canzano responded: "Yeah, because my life is in jeopardy and I'm tired of being asked the same questions over and over." When the prosecutor asked questions of Canzano about retaliation, either the questions were excluded or the answers were stricken.

"A trial court's exercise of discretion in admitting or excluding evidence is reviewable for abuse. [Citation.] Abuse may be found if the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner, but reversal of the ensuing judgment is appropriate only if the error has resulted in a manifest miscarriage of justice. [Citations.]" (*People v. Coddington* (2000) 23 Cal.4th 529, 587-588, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

We have reviewed the entire record and find no indication the trial court exercised its discretion in an arbitrary, capricious or patently absurd manner, and therefore find no error. Even if there had been error, there is no indication of a manifest miscarriage of justice.

Juror Misconduct

Santa Ana Police Officer Diego Lopez told the court outside the presence of the jury that a juror spoke to him in the hallway. He said: "I guess she saw my partner Duane Greaver walking in here limping. She assumed me and him drove in here together and she made a comment 'What, did you kick him, prior to coming up here?' And I basically told her no, it was an injury that happened during a vehicle pursuit. Has nothing to do with this case."

The court then questioned the jurors outside the presence of the jury. Juror No. 164 said she spoke with the officer and that it was a joke. Juror No. 113 said three of

the jurors asked the officer about his boots because they were "quite ugly." The juror had no idea the officer would be a witness. Defense counsel asked the juror why she did not inform the court she spoke with a witness when she saw the officer called as a witness. The juror responded: "I knew he came in after I talked to him, but I didn't think I violated anything because I didn't know he was a witness at the time."

Defense counsel then requested a mistrial, explaining concern that four of the jurors had "fraternized with the witness who was the only officer who is going to testify, who basically, whose credibility is going to be in question about certain decisions and things that he did. And we've got jurors who were paling around with him sitting right amongst them. I have a serious concern about that." The court responded that counsel had a "valid concern," and that they should speak with all of the jurors.

Jurors Nos. 111, 138, 127, 160, 119, 142, 120 and 101 confirmed there was a conversation with the officer. They said the conversation was short and limited to a discussion about the officer's boots. Juror No. 123 overheard a conversation about the officer's limping.

After all of the jurors were questioned, defense counsel renewed the mistrial motion. The court denied the motion and admonished both the police officer and the jurors.

The denial of a motion for a mistrial is reviewed for an abuse of discretion. (*People v. Welch* (1999) 20 Cal.4th 701, 749.) The motion should be granted only when """a party's chances of receiving a fair trial have been irreparably damaged."""" (*People v. Ayala* (2000) 23 Cal.4th 225, 282.) We see no indication of irreparable damage here. The conversations did not concern the case. The court admonished all of the jurors and the witness. We cannot conclude the court abused its discretion when it denied defendant's motion for mistrial.

Prop 36

At sentencing, the court stated: "[D]efendant was found guilty of transportation. But the jury did not find it was possession for sale under count 2. They did find him guilty of simple possession. So the question is under 1210 [subdivision] (a) of the Penal Code, transportation for personal use is eligible for Prop 36. [¶] The court has reviewed *People v. Dove* . . . . [I]ndicating, as we all know, that the defendant has the burden of showing that even though the jury came back with simple possession." After hearing argument, the judge stated: "[T]he court is not persuaded that it was for the personal use of the defendant."

"[A] factual finding that a defendant did not possess or transport a controlled substance for personal use, for purposes of Proposition 36 sentencing, can be made by the trial court under a preponderance of the evidence standard; neither *Apprendi v. New Jersey* (2000) 530 U.S. 466, nor *Blakely v. Washington* (2004) 542 U.S. 296, requires that it be made by a jury beyond a reasonable doubt." (*People v. Dove* (2004) 124 Cal.App.4th 1, 4.) A defendant has the burden of proving that transportation was for personal use. (*People v. Barasa* (2002) 103 Cal.App.4th 287, 295-296.)

"When a defendant is eligible for Proposition 36 treatment, it is mandatory unless he is disqualified by other statutory factors . . . . [Citation.] Placement of eligible defendants in Proposition 36 programs is not a discretionary sentencing choice made by the trial judge and is not subject to the waiver doctrine. [Citation.]" (*People v. Esparza* (2003) 107 Cal.App.4th 691, 699.)

Proposition 36 provides: "Notwithstanding any other provision of law, and except as provided in subdivision (b), any person convicted of a nonviolent drug possession offense shall receive probation." (Pen. Code, § 1210.1, subd. (a).) One of the specified exceptions applies when the "defendant . . . in addition to one or more nonviolent drug possession offenses, has been convicted in the same proceeding of . . . any felony." (Pen. Code, § 1210.1, subd. (b)(2).)

Here defendant, who has 20 prior convictions, was convicted of felony transportation of cocaine base in addition to simple possession of cocaine base. We find no error.

III

DISPOSITION

We have examined the record and found no other arguable issues. (*People v. Wende* (1979) 25 Cal.3d 436.) The judgment is affirmed.

MOORE, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

FYBEL, J.